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IN THE

# Supreme Court of the United States

October Term, 1973
No. 73-507

WILLIAM L. HAMLING, EARL KEMP, SHIRLEY R. WRIGHT, REED ENTERPRISES, INC., DAVID L. THOMAS, LIBRARY SERVICE, INC.,

*Petitioners,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

## Reply Brief for Petitioners Kemp, Wright and Thomas.

## ARGUMENT.

### I.

**Mere Proof of Knowledge of Contents Is Not Sufficient to Establish Guilty Knowledge. The Trier of the Facts Should Be Required to Find Beyond a Reasonable Doubt That the Accused Knew the Contents of the Material; Was Aware of the Obscene Character of the Contents; and With Such Knowledge and Awareness, Intentionally Disseminated the Material With the Specific Intent to Appeal to the Prurient Interest of the Recipient. An Honest Belief That the Known Contents of a Publication Are Not Obscene Should Constitute a Defense. The Rulings of the Courts Below, and the Instructions and Failures to Instruct as Requested, Deprived Petitioners of Rights Guaranteed by the Provisions of the First, Fifth, Sixth and Eighth Amendments (Replying to Gov. Br. pp. 43-51).**

The government states that the standard for judging *scienter* in federal obscenity prosecutions is as follows: "The proper test is whether petitioners were aware of the contents of the materials mailed." (Gov. Br. p. 43). The petitioners submit that such a standard for judging *scienter* is inconsistent with the rulings of this Court in *Roth v. United States, Smith v. California, Mishkin v. New York, Manual Enterprises, Inc. v. Day,* and *Ginsberg v. New York* (Pet. Br. pp. 18-32); contrary to accepted due process principles in ordinary criminal prosecutions (Pet. Br. pp. 32-37); violative of the First Amendment guarantees (Pet. Br. pp. 37-42); and unsupportable in law or logic (Pet. Br. pp. 42-50).

A. Relying upon the *Rosen* decision of 1896 and the decisions of appellate courts rendered in 1906

(*Burton v. United States*, 142 Fed.57), 1909 (*Knowles v. United States*, 170 Fed.409), and 1953 (*Schindler v. United States*, 208 F.2d 289) (Gov. Br. p. 44), all before the elements of the offense of obscenity were enunciated by this Court, the government asserts that congressional inaction in the light of these early decisions implicitly supports the government's position. There is no merit to this contention. Indeed, Congress did not seek to amend the statute in 1958 (Gov. Br. p. 44, n. 29), nor at any other time, when this Court in *Smith v. California*, *Mishkin v. New York*, and *Ginsberg v. New York* emphasized that the gloss placed on the words "character" of the contents means "calculated purveyance" of obscenity, and not mere knowledge of "contents".

B. The government evades the issue here presented by obscuring the primary distinction between the knowledge of the *essential facts* which bring the law into play and knowledge of *the existence of the statute and its meaning* as enunciated by this Court. We are told by the government that proof of knowledge of the "character" of the contents of the material is sufficient, but the Court is never informed as to what type of "character" is involved. The government has constantly refused to answer whether an accused in an obscenity prosecution may be convicted solely upon proof that he knew that the contents of the material dealt with "sex" or was "sexually oriented", or whether the proof was required to establish that the accused knew the obscene character of the contents of the material. The trial court refused every effort on the part of counsel for petitioners to obtain an elucidation for the benefit of the jury with respect to what was meant by "knowledge of the nature or character of the contents" (Pet. Br.

p. 20). The court below affirmed without any further explanation except to hold that the government need only prove that the accused knew the contents of the material. But, from *Roth* to *Miller* this Court has always stated that "sex" and "obscenity" are not the same, and clearly there can be no proof of guilty knowledge in an obscenity prosecution by mere proof that the accused was aware of the contents of material which dealt with sex. The government's brief fails to explain why the jury in this case was not told what was meant by the words "nature" and "character" and how it can be held that the jury was properly instructed as to the applicable law of the case, without a single reference to the need for proof of "calculated purveyance" of obscenity.

C. The government argues that it would be an "impossible and unrealistic burden" on the prosecutor to prove a defendant's knowledge of the *legal status* of the material (Gov. Br. p. 49). It is stated that as long as a defendant knows "the general character" of the material involved, he cannot claim that he was "unaware that his conduct might be illegal" (Gov. Br. p. 49). The government solicitously observes that there is no reason why the defendant should also be required to know that the materials "meet the current judicial standards of obscenity" (Gov. Br. pp. 49-50). Petitioners submit that these formulations by the government only result in an obfuscation of the issues. If the government is arguing that it should not be required to prove that an accused in an obscenity prosecution knew of the existence of an obscenity law, or this Court's interpretation of the law, then the short answer is that such a contention has never been made by the petitioners here. All that the petitioners are

urging here is that since "exceeding contemporary community standards", "appeal to prurient interest", and "utterly without social value" were material elements of obscenity at the time of this prosecution, the prosecution had the burden of proving knowledge of these qualities of the material. The government's burden was not merely to establish knowledge of the "general character" of the material, but awareness on the part of the petitioners of the obscene nature and character of the contents of the material. This burden to prove knowledge of the material elements of the offense is required in all areas of the criminal law with few exceptions (Pet. Br. pp. 35-37), and prosecutors in obscenity prosecutions have had no more difficulty in proving knowledge of the obscene nature and character of the materials than prosecutors have had in other areas where similar proof of guilty knowledge was required (Pet. Br. pp. 48-50).

D. The government relies on the decision in *Rosen*, and asserts that the decisions in *Smith v. California*, *Manual Enterprises, Inc. v. Day*, and *Mishkin v. New York* have "not departed from the Rosen rationale." (Gov. Br. p. 48). There is no mention by the government of this Court's decision in *New York Times Co. v. Sullivan*, 376 U.S.254. (See, Pet. Br. pp. 39-42).

Petitioners submit that the ruling in *Rosen v. United States* has been misinterpreted by the government, and that reliance upon the decision is both misplaced and untenable.

The same court which decided *Rosen v. United States* also decided *Price v. United States*, 165 U.S.311 (1897). In the *Price* case, a unanimous court held

that the indictment which charged the defendant with "unlawfully, wilfully, and knowingly" mailing the publication, an allegation substantially like the one contained in the *Rosen* case, must be taken to mean that "the defendant deposited in the mails a book *which he knew to be obscene*, . . . [T]his indictment is sufficient, because it does, in fact, contain a charge that the book was obscene, *to the knowledge of the defendant*, who knowingly and wilfully, *with such knowledge*, deposited it in the mails, and thus violated the statute." 165 U.S. at 312, 315 (emphasis added). Thus the applicable rule of law even as enunciated in the *Rosen* case means that the standard for judging *scienter* is knowledge of the alleged obscene nature and character of the material, a standard which was never given to the jury in the case herein by the trial court and where the government stipulated that the indictment charged no more than knowledge of contents (Pet. Br. pp. 18-19).

The conclusive presumption of *scienter* which the court in *Rosen* drew from proof of knowledge of the contents of the publication is without vitality, it is respectfully submitted. In 1896, the only standard for judging obscenity was an unconstitutional standard, to wit, the *Hicklin* standard, which, as applied, condemned an entire newspaper as obscene because some of the pages of the newspaper contained pictures of a female nude. In the light of the use of the *Hicklin* test by the court, and the omission of any discussion of the First Amendment, it was not difficult for the government to argue in 1896 that any accused should know that a picture of a female nude would be likely "to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands

it might come." But since 1896, this Court has recognized that every obscenity prosecution implicates First Amendment questions and that because of the developing standards for the protection of the freedoms of speech and press, the elements of the offense of obscenity must be far more narrowly confined. The attempt to take "judicial notice" or to "conclusively presume" knowledge of the obscene nature and character of the material solely from proof of knowledge of contents no longer can be justified, as a matter of logic or of law, in the 1970s. All experience is to the contrary (Pet. Br. pp. 42-48).

The government points to *Smith v. California*, 361 U.S.147 (Gov. Br. pp. 46-47). The government recognizes that this Court held the elimination of *scienter* to be an unreasonable requirement by the state, since it would result in "an undue restriction on the public's access to reading matter" (Gov. Br. p. 47). No attempt is made to explain why the same self-censorship on the part of booksellers, publishers and distributors would not be induced if conviction for guilty knowledge depends merely on proof that the accused knows that the contents of the material is sexually oriented. The government insists that this Court held in *Smith* that proof of knowledge of the "contents" of the book was sufficient to establish *scienter*, although it is plain from all of the opinions in the case that no judge of the court adopted such a view (Pet. Br. pp. 28-29). As appears hereafter, it is plain from Justice Brennan's statements in *Mishkin* and *Ginsberg*, that Justice Brennan used the term "contents" in *Smith v. California*, not as a definition of *scienter*, but as an expression of the minimal requirements of proof needed to establish the obscene character of the publications.

It is plain that Justice Harlan was of the view, in *Manual Enterprises, Inc. v. Day*, that the standard for judging *scienter* was proof of knowledge that the advertisers' works were obscene, and that the quality of proof in *Manual* was not sufficient to establish such a standard (Pet. Br. pp. 29-30). The attempt to distinguish *Manual* is not meaningful, nor does the government advance its position by describing Justice Harlan's statements as dicta (Gov. Br. p. 48). The government is sparing in its discussion of *Mishkin v. New York* (Gov. Br. p. 48). It repeats the quotation from the state court opinion which was emphasized by Justice Brennan, but it makes no mention of the important footnote 9 in the opinion, which pointedly rejected the test of "knowledge of contents" as a modification of the state court's definition of *scienter* (Pet. Br. pp. 30-31).

In further support of petitioners' analysis of the *Mishkin* decision, it may be helpful to the Court to examine the New York rulings to which Justice Brennan referred in his footnote 9 of the *Mishkin* case. In the first *Finkelstein* decision quoted in the *Mishkin* case, the Court, after construing the statute on the issue of *scienter*, reversed the judgment of conviction, stating: "At the time of the prosecutions of the violations herein, the prevailing precedent (*People v. Shapiro*, 6 A.D. 2d 271 [2d Dept.]) since soundly repudiated, however, (*People v. Richmond County News*, 11 A.D.2d 799 [3d Dept.]; see also, *People v. Douglas*, 12 A.D. 2d 194; *People v. Shenkman*, 12 A.D.2d 457) declared that *scienter* was not an element of the crime. Defendants, perhaps, believing because of Shapiro that their knowledge was irrelevant, did not take the stand or offer proof in this regard." 9 N.Y.2d at 346.

It will thus be noted that in the *Finkelstein* case the Court not only stressed the need for proof of intentional purveyance of obscenity, but that the Court, at the same time, called attention to the fact that lower court rulings had correctly repudiated prior decisions which suggested that proof of such *scienter* was unnecessary.

As noted above, the state court made reference, with approval, for example, to the New York Appellate Division ruling in *People v. Richmond County News.* In that case, the appellate court reversed the conviction upon the ground "that the proof in this case fails to establish beyond a reasonable doubt that defendant had knowledge of the *obscene character* of the magazine; and, in the absence of such proof, defendant's conviction cannot stand under the statute." 11 A.D.2d at 799. (Emphasis added). In *Douglas*, the other opinion referred to in *Finkelstein*, there was another reversal in this language: "It is our view, however, that the indictment is insufficient as it fails to allege knowledge on the part of defendants. Having decided that *scienter* is an essential element of the crime it would seem that this element must be alleged in the indictment. The various counts of the indictment state that defendants sold obscene magazines. This is not a crime unless the magazines are sold with the *knowledge*, actual or constructive, that they were *obscene*. Such a defect would be jurisdictional." 12 A.D.2d at 198 (Emphasis added).

In the case of *People v. Fritch*, 13 N.Y.2d 119, 243 N.Y.S.2d 1, 192 N.E.2d 713 (1963), also referred to in footnote 9 of the *Mishkin* opinion, the book *Tropic of Cancer* was held by the highest court of the State to be obscene [Cf., *Grove Press, Inc. v. Gerstein*, 378 U.S.577, 84 S.Ct. 1909, 12 L.Ed.2d 1305], but

the court ordered a new trial since "the jury's finding on the issue of *scienter* was against the weight of the evidence". 13 N.Y.2d at 126.

Moreover, it should be noted that not only has the government failed in its brief to discuss *New York Times Co. v. Sullivan*, but it also leaves unmentioned *Ginsberg v. New York*, 390 U.S.629, where the majority opinion emphasized that mere proof of knowledge of the "character and content" of any material was not sufficient without further proof of knowledge and intent to purvey obscene materials.

The government concedes that "obscenity is sometimes an elusive concept and persons who have knowledge of the contents and character of the materials may not know with absolute certainty whether the materials will be held legally obscene." (Gov. Br. p. 50). The government cannot suggest any resolution of this dilemma, except by pointing to the usual quotation from Mr. Justice Holmes in *United States v. Wurzbach* (Gov. Br. p. 50). In *Wurzbach*, the defendant was charged with a violation of the Federal Corrupt Practices Act. The statute made it an offense for a congressman or candidate to solicit contributions for any political purpose. The Court held that intentionally solicited contributions would violate the law, regardless of whether the purpose was to use the funds in a general election or in a state primary which might be under the control of the State. Justice Holmes did not, in *Wurzbach* or in *Nash*, create some talismanic label known as "take the risk". All that those cases held was that the

claim of unconstitutional vagueness in the statute was met by the legislative requirement of proof of a specific intent on the part of the accused to commit the elements of the offense which brought the laws into play.

The importance of the government's concession that obscenity is an elusive concept and that innocent persons may sometimes find themselves convicted of a violation of the law without proof of culpability is that without a stringent requirement of *scienter*, mistakes in fact finding may often occur in obscenity prosecutions with resultant diminution of First Amendment freedoms (Pet. Br. pp. 37-50).

E. The government quotes from some of the instructions given by the trial court (Gov. Br. p. 45), but it fails to include other instructions which bear importantly on the issue involved herein. Thus, the government points to the fact that the court instructed the jury that to establish specific intent, the government "must prove the defendant knowingly did an act which the law forbids purposely intending to violate the law" (JA 235). Of course, if this was the applicable law, it is clear that the record is absolutely barren of any evidence to establish that petitioners "purposely intended to violate the law". The government has never made such a claim and does not make such a claim here. More important, however, is the fact that the court instructed the jury that an act was done "knowingly" if it was done voluntarily and intentionally and not because of mistake or accident or other innocent reason (JA 235). Again, the government fails to note the addi-

tional qualification which the trial court placed on the meanings of the words "specific intent". Thus, the trial court charged the jury:

> "An act is willfully done, as I have stated before, if it is done voluntarily and intentionally and with the specific intent to do something the law forbids or, in this case, *with the specific intent or knowledge of the contents of the package.*" (JA 237) (Emphasis added).

Moreover, having thus instructed the jury that specific intent and knowledge was concerned only with the "contents" of the package, the court then added the following instruction:

> "It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted." (JA 237).

In the light of all the foregoing, it is plain that the case herein was tried on the theory that the standard for judging *scienter* requires no more than proof of knowledge of the contents of the material involved in the particular obscenity prosecution. The trial court never defined what was meant by the "nature and character" of the contents. The sole proof of intent required in support of the conspiracy charge and the substantive charges was knowledge of the contents, with knowledge reduced further to mere voluntary acts as distinguished from accidental acts.

Petitioners submit that the *mens rea* requirements in an obscenity prosecution should be no less than those which exist in the ordinary criminal prosecutions. Further, in order to avoid "the hazard of self-

censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity" (*Mishkin v. New York*, 383 U.S. at 511), the *scienter* requirement in obscenity prosecutions should include proof of knowledge of the alleged obscene nature and character of the material. The applicable law as given to the jury should include the requirement of proof of the knowledge of the contents of the material, awareness of the obscene nature and character of the material, and dissemination of the material with such guilty knowledge and specific intent to appeal to a prurient interest. A defense of honest belief that the known contents of the material are not obscene should be permitted in an obscenity prosecution.

There is no compelling interest to which the government can refer to justify the conviction of persons in an obscenity prosecution where knowledge of the essential facts which bring the law into play have not been established. There is no burden upon the government to prove that the petitioners knew that there was an obscenity law or knew that the standards for judging obscenity had been enunciated by this Court. Proof of the accused's awareness of the obscene character of the material may be established by direct or circumstantial evidence. The only requirement placed upon the government is to prove that the accused knew the obscene nature and character of the contents of the material, and this is a burden that can be fairly assumed by the government since, in the last analysis, the only charge made against an accused in an obscenity prosecution is that he *knowingly* mailed an *obscene* publication.

## II.

**The Record Is Barren of Any Evidence to Establish That Petitioners, or Any of Them, Knew the Contents of the Brochure. There Is No Evidence in the Record to Establish That Petitioners Corruptly Conspired to Violate the Federal Obscenity Statute by Mailing or Causing to Be Mailed the Alleged Obscene Brochure. There Is No Evidence in the Record to Establish That Petitioners Knowingly Mailed or Caused to Be Mailed or Aided and Abetted the Mailing of the Said Brochure (Replying to Gov. Br. pp. 63-68).**

The government repeats that the sole standard for judging *scienter* in obscenity prosecutions is awareness of "the contents" of the material (Gov. Br. p. 63). Since the government is satisfied that proof of knowledge of contents alone will meet all constitutional and legal requirements, then assumedly the government must be prepared to establish such knowledge by substantial evidence beyond a reasonable doubt. The proof should be clear and unequivocal and leave no troubling doubt. Since the government itself concedes that we are dealing with "elusive concepts", where persons charged with knowledge of the contents of the material may not know the obscene nature and character of such contents, it is plain that the quality of proof of *scienter* on the terms which the government proposes must not be based on suspicion or conjecture, or on hyperbole or exaggeration. The proof should be directed to the charge made against the accused in an obscenity prosecution and not to irrelevant and extraneous evidence, entirely neutral in character, solely intended to obscure the absence of any evidence of guilt.

A. The specific charge against these petitioners was the knowing use of the mails for the mailing, and knowingly causing to be delivered by mail, the alleged obscene advertisement. Each of the substantive counts of the indictment charged violations of §§2 and 1461 of Title 18 by the knowing use of the mails for the mailing on specified dates of an envelope containing the alleged obscene advertisement from North Hollywood, California, to named recipients (JA 14-25). These were the sole charges made against the petitioners. They were not charged with violations of any law regulating the activities of corporate officers or corporate directors. The sole charge that the government had made was that each of these petitioners knew the contents of the particular brochure here involved and, knowing the contents, allegedly mailed the brochures or caused the brochures to be mailed on the particular dates named in the indictment. The petitioners submit that no competent evidence was offered to establish the specific *scienter* charged in the indictment as interpreted by the government (Pet. Br. pp. 51-63).

B. The government states that the evidence showed that petitioners Reed Enterprises, Inc., and Library Service, Inc., "were responsible" for mailing the advertising brochures (Gov. Br. p. 63). That is not an accurate reflection of this record. The record here shows that the business offices of all the corporate petitioners were located in San Diego, California, where the individual petitioners were employed. There is nothing in the record to indicate that these petitioners in any way had anything to do with the preparation of the brochure herein. The evidence presented by the government at the trial showed that the brochures were sent

from an organization known as Regent House in North Hollywood, California, to the Academy Addressing and Mailing Service in North Hollywood. Richard and Venita Harte, the husband and wife who inserted the brochures, testified that their only relationship was with Bernard Lieberman on behalf of Regent House (JA 122-123). We stress that this was the government's proof in the case herein. The Hartes were the only witnesses presented by the government, and they testified clearly and distinctly that they had never met any of the petitioners in the case herein, directly or indirectly (JA 126-132). The brochures were presumably, insofar as the record shows, picked up by Regent House in North Hollywood and mailed from North Hollywood (JA 130).

According to the government, the brochures were allegedly printed in North Hollywood by London Press, Inc. (Gov. Ex. 54; R.T. 827). Therefore, as the record shows here, the brochures were printed in North Hollywood, inserted in North Hollywood by persons who testified that they knew nothing at all concerning the petitioners here, and mailed from North Hollywood after being picked up by the same Regent House which had delivered them. In addition, it should be noted that although London Press, Inc., of North Hollywood, the alleged printer, and Robert Reitman, Paul Wisner and Bernard Lieberman, doing business as Regent House, were named in the indictment as unindicted co-conspirators (JA 14), none of these named persons nor any officer of these organizations was ever called by the government as a witness. There is a check from Reed Enterprises to Regent House and a check to London Press from Reed Enterprises bearing the signature of petitioner Hamling (Pet. Br. p. 9), but there is no evidence that any of these petitioners knew the contents

of this particular brochure, as alleged by the government. The government attempts to transmute the record in *Mishkin v. New York* into the case herein (Gov. Br. p. 64), but the record in *Mishkin* was quite distinct and separate from the barren record in the case herein. There is no evidence here that these petitioners, or any of them, had a "dominant" role in producing and distributing "obscene materials". These are perjorative statements without basis in fact.

C. The government states: "Petitioner Hamling played an active role in causing the brochure to be mailed" (Gov. Br. p. 64). There is not the slightest evidence in the record that petitioner Hamling played an "active role", or any role, in allegedly "causing the brochure to be mailed". There is no proof in the record to support this statement. On the contrary, the only evidence which the government relied on to prove its case against petitioner Hamling was his signature on the aforesaid two checks. There was not the slightest proof offered by way of declaration or conduct on the part of petitioner Hamling which could reasonably support a finding that the said petitioner knew the contents of the brochure which was mailed in North Hollywood. There is no proof in this record as to the size and extent of the businesses of the various corporate petitioners here or the size and number of employees in the various enterprises located in San Diego. The government is reduced to arguing that because the signature of petitioner Hamling appears on two checks, such neutral fact in itself justifies a finding beyond reasonable doubt that petitioner Hamling knew "the contents of the brochures and the fact that they were to be distributed through the mails" (Gov. Br. p. 64). There is simply no merit to this contention (Pet. Br. pp. 57-

58). It should be observed that on the basis of this attenuated record, petitioner Hamling was sentenced to imprisonment for four years.

D. The government states that petitioner Kemp was "the Vice President and Editorial Director of Greenleaf Classics, Inc., the publisher of the *Illustrated Report* (Gov. Exhs. 19, 21). Greenleaf Classics operated from the same business address as Reed Enterprises and Library Service (J.A. 138)" (Gov. Br. p. 64). These statements, of course, have nothing to do with the case herein. Petitioner Kemp was the editor of the *Illustrated Report*, but the jury did not agree that the *Illustrated Report* was obscene as charged in the indictment, and the book may therefore be deemed to be presumptively lawful and constitutional. To quote the government's own brief, "Greenleaf Classics, Inc., the publisher of the Illustrated Report, was also indicted, but was acquitted on the counts involving the advertisements, including conspiracy, and the jury was unable to reach a decision on the counts involving the Illustrated Report" (Gov. Br. p. 5, n. 3). It follows from all of this that the government has added nothing in its brief with respect to petitioner's alleged knowledge of the contents of a brochure mailed from North Hollywood, the only charge involved herein.

The only evidence that the government can point to is petitioner Kemp's signature on an application for a Post Office box, the box number which the government alleges appears on the brochure. But again the government simply ignores the record. The government's own evidence shows that the Post Office box number had already been in the name of Library Service, Inc., sometime prior to the date when petitioner Kemp

affixed his signature to an application for renewal. This signature was obtained as a result of the instigation by a postal inspector who conducted the investigation which led to the prosecution herein. A Post Office employee was sent to San Diego to insist that new signatures appear on the application for the same Post Office box. The petitioner Kemp was called out of his editorial office to sign the application for the postal employee. Petitioner Kemp did not know whether or not he held an officership in Library Service, Inc. The government's own witness testified as follows:

"Q. Did Earl Kemp make any specific statement to you regarding any officership he may or may not have held in Library Services?

A. The only thing he stated was that he did not know all of the officers nor his capacity in the various organizations.

Q. All right. Did Shirley Wright make any statement to you with respect to any positions Earl Kemp may or may not have held?

MR. KATZ: Hearsay as to Mr. Kemp, your Honor.

THE COURT: Overruled.

THE WITNESS: The only one that I knew of is that it was determined that she—in conversation between Mr. Kemp and Shirley Wright, that he was Vice-President of Library Services.

Q. You overheard this conversation while you were standing there?

A. While I was standing there they conversed with each other to try to determine the positions of each in Library Services." (JA 146).

It is plain from all the testimony revolving around the single incident of the renewal of the application for the Post Office box that petitioner Kemp at the most occupied only the nominal position of Vice President, that he was not even certain that he occupied such position, and that he signed as a mere formality and nothing more (JA 137-146). The sole charge against petitioner was that he knew the contents of the brochure, and the mere fact that the brochure bore a return Post Office box number gives no support to the charge made in the indictment that this petitioner knew the contents of the brochure or was in any way connected with its preparation, printing or mailing from North Hollywood.

The government labors to eke out some proof, but it is entirely unavailing. It is stated in the government's brief (p. 65) that the illustrations used in the brochure were taken from illustrations in the *Illustrated Report*, but this in no way establishes that the editor of the *Illustrated Report* was in any way responsible for the advertising brochure. The government points to petitioner's "dominant role as editor of the *Illustrated Report*" and "the nature of the relationship of Greenleaf Classics, in which petitioner served in an executive capacity, to the corporate petitioners" (Gov. Br. p. 65), but none of these statements serves in any way to establish the sole charge against petitioner that he knew the contents of the brochure herein. The government speaks of petitioner's "role in assisting with arrangements for the brochures' distribution by mail" (Gov. Br. p. 65), but there is not the slightest evidence to support this undocumented assertion.

The fact is that petitioner Kemp submitted a sworn affidavit indicating that he knew nothing concerning

the preparation or contents of the advertisement and that at the time the brochure was allegedly prepared and mailed in North Hollywood petitioner Kemp was in Europe on a business trip (Pet. Br. pp. 55-56). On a record barren of any evidence of guilt under the sole charge upon which a conviction was returned, the petitioner Kemp received a prison sentence of three years and one day.

E. There is not the slightest scintilla of evidence offered by the government (Gov. Br. pp. 65-66) to support the judgment of conviction against petitioner Thomas. It is stated that the petitioner signed "San Diego municipal business license applications" for the corporations; that he dealt with an employee of Pitney-Bowes regarding the rental of a postage meter; that the meter was "used for the mailing of the *Illustrated Report*", the alleged obscenity of which the jury could not agree upon; and that he signed a Library Service, Inc., check for payment on account with Reed Enterprises, Inc., "vendor for the Illustrated Report" (Gov. Br. p. 65). Of course none of the aforesaid has anything to do with the charge involved herein. Therefore, the government continues: "While these facts did not constitute direct evidence of Thomas' part in causing the mailing of the brochure, they did show that he was a pivotal corporate figure in Library Service, the petitioner identified on the brochure as responsible for its mailing." (Gov. Br. p. 66). There is not the slightest evidence that petitioner Thomas was a "pivotal corporate figure" in any of the corporate petitioners, nor does the name of any petitioner appear on the brochure. The name Library Service did appear on the brochure, but on the government's own proof the only persons "directly responsible for the mail distribution of the

brochure" were individuals doing business as Regent House in North Hollywood, persons whom the government never called as witnesses.

F. The government commences its discussion of proof with respect to petitioner Wright by immediately conceding that petitioner's involvement "is somewhat more attenuated" (Gov. Br. p. 66). The only evidence that the government has to offer is her employment as secretary and her occupation of various offices as what is obvious from the record is no more than nominal. That a corporation resolution authorized petitioner Wright to travel abroad, or that she typed and signed Post Office box rental applications for Post Office boxes, or that she received a letter from the printer with respect to the shipment of copies of the *Illustrated Report* (Gov. Br. pp. 66-67) adds nothing to the government's proof with respect to knowledge of the contents of the particular brochure involved herein. Thus, the government is compelled to speak of petitioner's position in "the corporate hierarchy", her "management of the everyday corporate affairs", as well as her "responsibility for the post office boxes rented by the corporation", as establishing that petitioner was in some way aware of the contents of the advertising brochure mailed out from North Hollywood.

Petitioners respectfully submit that there is no competent evidence in the record to establish knowledge of contents as claimed by the government. The government is unable to produce from a Reporter's Transcript of Proceedings, which is over 5,000 pages in length, any evidence, direct or circumstantial, which establishes the specific charge made against these petitioners and under which they were separately convicted. There is

not a single statement or a specific act on the part of any of these petitioners to which the government can point to establish that each of these petitioners, or any of them, knew the "contents" of the brochure. Thus the government is left to urge that "direct proof showing an actual examination of the brochure is unnecessary", and that anyone who deliberately "insulates himself against knowledge . . . is [not] to be free to maintain an emporium for smut" (Gov. Br. p. 67). But there has never been a claim made that "direct proof" is necessary to establish *scienter;* what is necessary, however, is proof, clear, convincing and unequivocal, which establishes the alleged guilty knowledge. Nor is there any proof in the record that these petitioners, or any of them, deliberately "insulated" themselves against knowledge.

The real essence of the government's position is this. The government does not desire to be burdened with any proof of *scienter* in an obscenity prosecution. The government is seeking to circumvent the ruling of *Smith v. California* and to impose strict liability in the obscenity area. The elimination of proof of *scienter* will, of course, ease the prosecutor's task in obscenity prosecutions, but it will do so only at the expense of those fundamental constitutional rights to which these petitioners and the public generally are entitled, as delineated in the decisions of this Court in *Smith v. California* and other related decisions.

F. The government devotes twelve lines of its brief to the charge of conspiracy (Gov. Br. pp. 67-68). The issue is discussed in petitioners' brief at pages 61-63. The government's argument is simply that the petitioners were shown to have acted "in concert" and that

this is sufficient to establish the charge contained in the indictment. Such a claim by the government has ominous portent. There is not a single publisher, distributor or bookseller, or film producer or exhibitor who, together with all corporate officers and employees, do not face a charge of conspiracy to violate the federal obscenity statute merely because some individual or officer allegedly "knew the contents" of a publication or film later found by some judge or jury in some local community to be "obscene".

In the case herein, there was no proof that these petitioners, or any of them, entered into a corrupt agreement knowing that the particular brochure involved herein would violate the federal obscenity statute. There was never even such a claim by the government at the trial level, and clearly there never has been any proof in support of such a charge. Yet, without proof of knowledge of the obscene nature and character of a publication, and without proof that with such guilty knowledge an intent existed to violate the law, there can be no conviction upon a charge of conspiracy (Pet. Br. p. 63). As this Court has stated:

> "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed. See Jackson, J., concurring in Krulewitch v. United States, supra." *Grunewald v. United States,* 353 U.S.391.

If this be true in ordinary conspiracy prosecutions, it is submitted that the standard of proof in charges of conspiracy to violate the obscenity statute should be

stricter, for we are here involved in an area where First Amendment questions are implicated, a point that this Court has repeatedly emphasized from *Roth* to *Miller*.

III.

**The Wholesale Exclusion of Constitutionally Relevant Evidence Proffered by Petitioners Deprived the Petitioners of a Fair Hearing and Fair Trial, an Opportunity to Be Heard and to Defend Against the Charges, With Resultant Deprivation of Petitioners' Liberty, Contrary to the Free Speech and Press, Due Process and Fair Trial Provisions of the First, Fifth and Sixth Amendments (Replying to Gov. Br. pp. 37-43).**

The government commences its discussion of this important issue by stressing that the defense had the opportunity to introduce "expert testimony". The question presented here, however, is not as to the abstract value of expert testimony, although it may be stated that the government's evaluation of the use of expert testimony before the trial jury in this case was somewhat less favorable than it is presently before this Court. The real issue is the validity of the trial court's ruling, as follows: "[I]t is the Court's opinion that the cases support the proposition that the Court is required to allow defense counsel to proceed in order to show the community standards involved, either by comparables, by the introduction of comparables *or* by the introduction of expert witnesses with respect to the elements to be shown." (JA 157-158) (Emphasis added). Here, therefore, was the exclusion of an entire category of evidence offered by the petitioners on the issues of obscenity and *scienter*, and while the trial court did permit petitioners to make a record with respect to the

evidence which was excluded, the fact remains that the trial court decided virtually from the inception of the trial to the end that no evidence would be permitted on behalf of petitioners except that which came from the oral testimony of expert witnesses. The government has not addressed itself to this issue, but has chosen instead to discuss various items of evidence which were offered by petitioners. Petitioners meet these separate issues separately, but it should be initially noted that the effect of the trial court's ruling was to turn aside every attempt by petitioners to introduce documentary and comparable evidence bearing on community standards. There was a wholesale exclusion in this case of constitutionally relevant evidence, and this was, it is submitted, violative of petitioners' constitutional rights to due process and a fair trial (Pet. Br. pp. 64-76).

A. The government contends that the mere fact that similar materials are *available* on newsstands does not demonstrate acceptability by the community. Since the defense experts concededly testified that the brochure did not appeal to prurient interest, was not patently offensive, and was not without social value, the government can see no value in informing the jury that "similar materials were available" (Gov. Br. p. 39). As the government puts it; "It is far less time consuming, more productive, and less confusing to the jury, if the experts testify only as to the subject materials." (Gov. Br. p. 39).

The significance of the government's argument is readily apparent. It is enough, states the government, for the jury to receive the opinion of the experts with respect to the particular publication involved. On the issue of contemporary community standards, the jury is not to be advised, according to the government, that compa-

rable material is available in the community. Such an argument in essence amounts to no more than a deprivation of an accused's right of a trial by jury.

It may be, as the government argues, that the availability of similar materials does not necessarily demonstrate acceptability by the community, but that issue is not presented in this case because the defense experts testified that comparable material, from their knowledge and experience, was reasonably accepted throughout the nation, and yet the trial court refused to admit such testimony (Pet. Br. pp. 67-68). In *United States v. Manarite*, 448 F.2d 583, a case relied upon by the government (Gov. Br. p. 39), the court was careful to note that while evidence of mere availability of similar materials was not probative of community standards, such similar materials would be admissible if the proof showed that the material enjoyed "a reasonable degree of community acceptance". The court noted that such proof would normally be supplied "by expert witnesses" and that no such proof had been offered (448 F.2d at 593). In the case herein, the following colloquy occurred between defense counsel and expert witness Dr. W. Cody Wilson:

> "Q Now earlier I showed you Defendants' QQ and RR. Do you recall seeing these before, sir?
>
> A Yes, I do.
>
> Q And could you tell us, Dr. Wilson, do these magazines have a reasonable degree of acceptance in the nation as a whole?
>
> A I think they do have.
>
> * * *

Q At this time, Dr. Wilson, I will show you these additional three publications and ask you to look those over.

A Yes, sir.

Q Are those publications I just handed you similar to the material you have seen in San Diego and other cities or different?

A They are similar to—I have seen these specific things in San Diego and in other places in the United States.

Q Do those three publications have a reasonable degree of acceptance in the nation as a whole?

A I think so.

* * *

MR. KATZ: Your Honor, at this time we would like to have QQ and RR marked in evidence. We are offering them in evidence. We would like these other three publications marked and placed in evidence.

THE COURT: Doctor, do they essentially depict what is set forth there as explicit sexual material—depict that which is set forth?

THE WITNESS: Yes, it fits into this definition of explicit sexual material.

THE COURT: I see no need for it to come into evidence, Mr. Katz. They may be marked for identification, but there is no need for them to come into evidence." (R.T. 3577-3579).

The fact is that comparable material which the defense experts testified found reasonable acceptance in the community was excluded from the jury's consideration because the trial court had decided that it would not permit any comparable testimony to be introduced

(JA 213-215). It should also be noted that the value of the testimony of the expert witnesses on behalf of petitioners was diminished by the refusal of the trial court to permit the jury to see the very publications which the experts testified were comparable to the brochure and available and accepted in the community. The jury was deprived of the opportunity to see the basis for the experts' opinion that the brochure here did not exceed the standards of the nation as a whole.

B. Turning to the discussion of particular items of evidence, it is significant that the government has not chosen to discuss the aforementioned comparable evidence offered by petitioners which met all the requirements of admissibility on the government's own terms and which concededly involved "explicit sexual material".

The government argues that publications which this Court "apparently concluded were not obscene" (Gov. Br. p. 40) were properly excluded because the introduction of such testimony would "confuse the jury" and "the probative value was slight" (Gov. Br. p. 41). It is also argued that no determination was made whether the film and magazines in *Pinkus* and *Burgin* were "truly comparable". These arguments appear to replace a defendant's right to a jury trial with the fiat of a government official. No valid reason is advanced to show why the showing of the single film and the two magazines would have been "confusing", and it is clearly not the function of an official to determine the "probative value" of evidence. That is a matter for the jury. The film and the publications were sufficiently comparable in matters dealing with sex and nudity to justify their admission into evidence unless some more

substantial reasons can be advanced than the mere generalities of "confusion" or "lack of probative value".

The argument of the government (Gov. Br. p. 41), that if the materials are "truly comparable" then there is all the more reason for the exclusion of such material from the jury after this Court has held such material to be constitutionally protected, is incomprehensible. If comparable material has been held constitutionally protected by this Court and has passed into the stream of communication and the thinking process of the community, it is a sheer denial of due process to refuse to permit a jury to see such material when a comparable publication is on trial for allegedly offending contemporary community standards. To argue, as the government does, that if fully comparable material which this Court has found to be constitutionally protected is not permitted into evidence before the jury, the rights of the accused will anyway be protected "by the stringent appellate view characteristic of this area" (Gov. Br. p. 41, n. 26) is reflective of the effort to diminish the right of the accused in an obscenity prosecution to a jury trial. Equally invalid and unacceptable is the argument by the government that a ruling requiring the admission of comparable materials which the courts have concluded are entitled to protection would cause trial courts "to err on the side of caution" and admit such evidence, with alleged confusion to the jury.

C. Other individual arguments in this area by the government are without merit. A comparable magazine, "Nude Living No. 63", was offered, both because it had second-class mailing privileges and because it was comparable and acceptable (JA 212-213). It was

relevant, it is submitted, for the jury to know that a comparable publication had second-class mailing privileges. Under the law, the Postmaster may revoke the entry of a publication as second-class mail if he finds that the conditions for entry and mailing as second-class are not met, as for example, if the publication is obscene and therefore nonmailable. See, 39 U.S.C. §§4352-4354 and the regulations thereunder.

The survey which the witness Virginia Carlson conducted to determine the reactions of the residents of San Diego to the *Illustrated Report* and the brochure was, according to the government, properly excluded because the survey was allegedly an attempt to evaluate the brochure by others instead of leaving the matter to the jury (Gov. Br. p. 43). This argument is plainly without merit. The witness was testifying in court; she was subject to cross-examination; and the government prosecutor had every opportunity to show any weakness in the survey, if there were any. That was a matter for the jury to decide. If the government is arguing here that such surveys with respect to community standards should never be admitted, it is sufficient to refer the government to this Court's decision in *Miller v. California*, 413 U.S.15, where it was held in note 12 of that opinion that a police officer was qualified as an expert to testify with respect to community standards and with respect to a "state-wide survey".

## Conclusion.

The petitioners herein adopt all of the arguments contained in the reply brief submitted by the remaining petitioners in the case with the same force and effect as if fully set forth at length.

For the reasons stated, it is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

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